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WASHINGTON JOURNALISM REVIEW
January 1985

OUTTAKES FOR THE DEFENSE

*The Unseen Film From
"The Uncounted Enemy"*

By David Zucchino

A For nearly an hour one afternoon in November, 12 jurors in room 318 of the federal courthouse in Manhattan stared at the pale, pinched face of George Allen. A former expert on Vietnam for the CIA, Allen spoke in the arcane lexicon of bureaucrats and intelligence analysts. Often, his thoughts tumbled out in half-sentences and convoluted phrases.

There was no way for the jury to determine from Allen precisely what he meant to say. Allen was not inside Room 318. He was not even in Manhattan. He was speaking on videotape. The jury was seeing "outtakes"—film shot for but not used in a television program.

George Allen's TV performance in the \$120 million Westmoreland-CBS libel trial involved the sort of courtroom examination that TV networks and newspapers have come to dread. The perusal of TV interview outtakes and of reporters' interview notes in libel trials brought by public officials has become an unpleasant fact of life for the news media. The industry and its libel lawyers complain bitterly that such viewings by libel juries have a powerful chilling effect on reporting about public officials.

If networks and newspapers know in advance that every word of every interview may one day be laid bare before a jury, members of the press argue, news organizations will be intimidated in ex-

ercising their First Amendment right to comment freely on the performance of public officials. They fear that the viewing of outtakes and notes subjects extraneous material and offhand comments to misinterpretation. And that, they say, permits juries to second-guess the professional decisions of reporters and editors.

The subject of the Westmoreland trial—"The Uncounted Enemy: A Vietnam Deception," broadcast by "CBS Reports" in January 1982—has focused media attention on the outtakes issue as has no other libel trial in American history. The courtroom looks like a TV studio. Outtakes are shown so often by the general's lawyers that TV monitors and VCRs are permanently set up around the room. CBS attorney David Boies uses a VCR as a lectern; the trial judge has taken to saying "cue it up" when outtakes are about to be shown.

The video clips have raised basic questions of fairness. Do jurors fully understand that only a fraction of the material gathered for a story is actually used, especially for a long documentary or investigative series on a complex subject? Do they understand that a major part of journalism involves evaluating what is to be used and how it is to be condensed and presented? Can a juror who has never prepared a news story appreciate the fact that disregarding certain material is no proof of malice?

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ial necessary to determine a reporter's "state of mind" in preparing a story or broadcast about a public official. To erect an "impenetrable barrier" to such material would obstruct juries in libel cases involving public officials, Associate Justice Byron R. White wrote for the majority. The ruling stemmed from an appeal in another CBS libel case: *Herbert v. Lando*, in which Lieutenant Colonel Anthony Herbert sued CBS over a "60 Minutes" broadcast.

Underlying that ruling, of course, was the landmark 1964 Supreme Court decision in *New York Times v. Sullivan*. The Court required a public official to prove not only that material published about him was false, but also that the news organization knew it was false or showed "reckless disregard" for whether it was false. Such disregard was defined by the court as malice—to be determined largely by examining state of mind.

Many in the press believe the state-of-mind aspect of *Sullivan*—a decision considered a landmark First Amendment victory—intimidates journalists because of the way the concept has come to be applied. A journalist who knows that every second of every interview could be dissected in court, they reason, might just stop doing tough stories.

"It has not only opened up the newsroom, but the journalist's mind to judicial inquiry," Henry A. Grunwald of *Time* magazine said in a November speech at New York University. *Time* is being sued for libel by former Israeli defense minister Ariel Sharon in the same courthouse as the CBS trial.

"... Perhaps all this would be acceptable if it were to lead to greater care and a greater sense of responsibility," Grunwald said. "But, in many cases, it simply leads to caution and a tendency to shy away from controversy or risk."

George Allen's long interview with CBS Producer George Crile was part of a series of outtakes shown by Westmoreland's lawyers. Crile now finds himself in the uncomfortable position of guinea pig in the relatively new art of trial by video clip.

A Crile is a defendant in the suit, along with CBS correspondent Mike Wallace and Samuel A. Adams, a former CIA analyst under Allen, who appeared in the documentary based on 14-year-old charges by Adams, and who was interviewed on the broadcast but not identified as a paid consultant.

Crile declined to be interviewed on the record about the outtakes.

"The Uncounted Enemy: A Vietnam Deception" accused Westmoreland of deceiving the Joint Chiefs of Staff and President Johnson about enemy troop strength. The documentary alleged "a conspiracy at the highest levels of American military intelligence" to suppress and distort intelligence estimates showing a much greater enemy than Westmoreland's command was reporting.

The outtakes of interviews with Allen and with other military intelligence analysts are powerful stuff. Each man is shown making remarks that seem to contradict the broadcast's premise. Westmoreland's lawyer, Dan Burt, repeatedly told the jurors to ask themselves why the comments were not used—and he clearly did not expect them to answer "journalist's prerogative."

"Watch Mr. Crile cajole Mr. Carver to get him to say things," Burt said of the outtakes. "Watch Mr. Crile plant the conspiracy thesis for Mr. Allen."

The Allen outtakes proved troublesome for CBS when Allen's offhand remarks to Crile were shown to the jury. "What do you want me to say, George?" he asks Crile when the producer seems dissatisfied with his answers.

In the outtakes, Crile also seems determined to pry incriminating statements about Westmoreland from the officers. He asks the same questions again and again until he gets an answer that seems to satisfy him. He apologizes for "hectoring" one officer. "Help me," he implores another when he wants elaboration.

CBS hardly helped its own case by editing a response by one officer, Colonel Gains Hawkins, to make it appear in the documentary that he was referring to intelligence reports by Westmoreland's command as "crap." The outtakes reveal that Hawkins was actually referring to outdated reports supplied by the South Vietnamese Army. CBS also spliced tape to make it appear that another officer's answers to hypothetical questions were responses to a specific question about Westmoreland's ethics.

Even with a relatively unambiguous and friendly—to CBS—witness, such as General Joseph McChristian, the outtakes raised questions. CBS quoted McChristian as saying his intelligence estimates had been "suppressed." But the outtakes prove he never said that. CBS also implied that McChristian had been transferred for reporting high estimates. But this McChristian quote was not used: "I just assumed it was normal Army transfer policy."

Even with the outtakes, had the jury been given the whole picture? Definitely not, argue TV producers and media libel lawyers. For one thing, the jury did not see what the officers might have told Crile off-camera, which could very likely have involved much more detailed discussions. For another, the clips did not permit the jury immediately to take into consideration other interviews or information used by CBS to put the officers' statements into context.

"The concept that the outtake is the full story is just not true," says David Tabacoff, a producer for ABC's "World News Tonight," who is covering the trial. "I've done a lot of interviews where a guy has sounded great off-camera, but you put him on and he suddenly forgets everything."

Tabacoff says that showing the outtakes was misleading because it focused the jury's attention on the journalistic process rather than on Crile's state of mind. "Even if you do your 20 seconds [on the air] in absolutely good faith, what you *could* have put on is always there to be used against you," he says. As he watched the outtakes, Tabacoff says he remembered thinking: "I wouldn't want that done to me."

The statements CBS chose not to include in the program did not necessarily diminish the truth of the statements in the broadcast that did support the show's thesis. Virtually every intelligence analyst interviewed by CBS made contradictory statements that are open to broad interpretation. CBS can logically argue to the jury that statements selected for the program were those supported by information from other sources.

Ironically, CBS has sought and been refused a mistrial on grounds that the outtakes themselves were edited and shown out of context by Westmoreland's lawyers. That, of course, is the very charge Westmoreland has leveled against the network. Boies has pressed his point by showing "outtakes" of outtakes that were edited and shown by Burt.

Lost in the debate over outtakes is the fact that the jurors had not seen the entire broadcast before many of the outtakes were shown. In effect, they are basing part of the libel verdict on what was *not* aired—and they have made some of these crucial judgments before seeing the entire program alleged to be libelous. What they have seen, however, tends to support—at least superficially—one of Burt's most serious charges against CBS. He accuses the network of persecuting Westmoreland and his primary supporter, Lieutenant General Daniel O. Graham, in their interviews. Burt charges that CBS coddled and coached "friendly" witnesses, such as Allen and Hawkins. He has pointed out that Wallace, one of the toughest interviewers in the business, was assigned to interview Westmoreland and Graham, the alleged conspirators.

Bruce Sanford, First Amendment counsel for Sigma Delta Chi, believes the program's "prosecutorial nature" has complicated CBS' libel defense. "The [public] bias against big media institutions is aggravated in this case by advocacy journalism," he said. "It makes the media appear presumptuous."

The CBS tactics, Sanford says, now permit Westmoreland greater latitude in displaying a sense of "righteous indignation" to the jury. Conceivably, that sense has been reinforced by the Westmoreland outtakes, in which the general appears to be hounded by Wallace. At one point in the outtakes, Westmoreland exploded: "Well, that is absolutely fallacious... I'm absolutely amazed that you would come out with a statement like that." And later he shouted at Wallace: "Now let's stop it!"

Wallace hammered away at the general, often cutting him off and asking questions over the top of Westmoreland's answers. Westmoreland, who claims CBS deceived him about the subjects to be discussed, appeared flustered and defensive as he groped for words. He told the jury that Wallace, with Crile holding up cue cards containing follow-up questions, had conducted an "inquisition."

"I realized I was participating in my own lynching, only the problem was I didn't know what I was being lynched about," he testified. "I realized he [Wallace] and Mr. Crile had orchestrated a scenario to go for the kill. They wanted to go for my jugular."

The Westmoreland outtakes certainly could be interpreted that way. The jury saw Westmoreland darting his eyes and licking his lips. While that might well be seen as evasiveness, Westmoreland offered the jurors a novel explanation: His lips were dry because of the hot TV lights. With that single comment, he made the outtakes work for him by evoking the jury's sympathy.

The jurors also learned from the outtakes that Adams, Allen's former protégé at the CIA, was present off-camera during the filming of Allen's interview. They watched Allen turn three times to Adams for guidance, asking him his memory of one 1967 incident by saying, "What happened, Sam?" Crile coaxed Allen to support Adams' thesis, saying, "George, come to the defense of your old protégé, Sam Adams."

Allen also made statements, left out of the program, that contradicted its premise. He repeatedly said, for instance, that discrepancies in enemy troop estimates resulted from "bookkeeping" problems.

On the other hand, CBS did not use an Allen comment that supported a key CBS allegation: that the CIA's giving in to Westmoreland's command in an intelligence dispute over enemy strength was "the mistake of the century." Nor did the program include Allen's stated belief that he and other top CIA officials "perverted ourselves" in a way that was "not beneficial to U.S. national interests."

The outtakes of Wallace's interview with General Graham gave Burt similar opportunities to imply to the jury that CBS had deceitfully withheld information contradicting its thesis. Graham's 21 seconds on the broadcast, for instance, did not include his contention that Sam Adams had an "obsession" with enemy troop estimates and was the only analyst in the U.S. intelligence community to disagree significantly with Westmoreland's numbers. Graham said Adams "has got a

hang-up that verges on a mental problem." Given that charge against the network's primary source, the outtakes put CBS in the difficult position of having to explain why it did not let an accused "conspirator" fight back against his chief accuser.

The Graham outtakes showed the jury that CBS had left out his denial of the program's allegation of a "ceiling" on enemy troop estimates: "Nobody told me there was some figure I couldn't go over or under."

Although Crile told Benjamin that he believed Graham was being "demonstrably untruthful," the outtakes permitted the jurors to make their own evaluation of Crile's professional judgment. Only they can decide whether the inclusion of Graham's response to an allegation that he blocked intelligence reports—"I never blocked any reports"—balances the omission of his other denial.

So it went in the courtroom, with the outtakes offering jurors an array of con-

flicting statements as bewildering as the intelligence numbers game they described. Only the jurors themselves know whether the clips clarified or muddled the state-of-mind question.

Henry R. Kaufman, general counsel of the Libel Defense Research Center and a New York libel lawyer who represents media clients, believes outtakes have no place in the courtroom. He calls their legal use "an intrusion on the editorial process that allows judges and juries to second-guess editorial decisions."

The outtakes leave the misleading impression that anything that is not used is left out for malicious reasons, Kaufman says. He does not believe jury members are sophisticated enough to understand

the concept of constitutional malice.

Many First Amendment scholars agree, contending that libel juries have disregarded the stringent *Sullivan* malice test and have focused instead on whether published material seemed malicious in the literal, not the legal, sense. They believe jurors confuse ill will, animosity or even aggressiveness with "constitutional" malice.

Benno C. Schmidt, Jr., dean of Columbia Law School, says the malice standard "bears little relation to the ordinary meaning of the word." He says the lay people who serve on juries misapply the standard because they do not understand it, despite instruction by judges.

As *New York Times* columnist Anthony Lewis wrote in a 1983 *Columbia Law Review* article: "When a case goes to a jury, the *Sullivan* rule means little or nothing.

"When a judge's charge lasts an hour or more, and one sentence speaks of the need to find 'reckless disregard,' it rolls right past the jurors—it would roll past any of us."

If those jurors have spent hours watching material a network decided not to include in a program, they might naturally conclude that only a reporter with malice in mind would "conceal" a huge chunk of the story.

Pierre N. Leval, the federal judge presiding over the Westmoreland trial, has recognized part of the problem by forbidding lawyers for either side to mention the word malice. He prefers "state of mind." Leval frequently hauls out a huge chart to help explain to the jurors the importance of state of mind to their verdict.

Still, Kaufman wonders how much of the chart and Leval's rather professorial instructions will sink in as the jurors watch the outtakes. "The jury can easily be convinced that if there's all this smoke here in this outtake, then there must be something behind it," he says. "They'll wonder: What are they trying to hide?"

Also poorly understood by jurors, Kaufman believes, are the strict time and space restraints placed on TV and newspaper reporters. Presumably, CBS will attempt to impress such matters on the jury when it presents its defense.

Another issue involves the subtle influence of a reporter's mannerisms and interview techniques. Perhaps Crile seemed duplicitous or manipulative to the jurors watching him on videotape. He was probing and aggressive with one analyst, gently coaxing with another. Was that evidence of malice or merely good technique?

"I'm sure Crile was very uncomfortable when the jury was seeing his demeanor, his tone of voice, all the little things you say in asides that can appear damaging," Tabacoff says.

Sanford points out that interviewing public officials requires a sophisticated mix of stroking and bullying. What a re-

porter considers a good, tough question may be interpreted by a jury as evidence of malice—constitutional or otherwise.

"Getting the truth from a reluctant witness often requires either cajoling and flattery or a rough cross-examination," Judge Leval wrote in a pretrial opinion in which he rejected CBS' motion to dismiss the suit. "The use of such tactics is often necessary to arrive at the truth. By itself, it does not demonstrate disregard for the truth."

Leval added: "Nor is the reporter required to accept denials of wrongdoing as conclusive, or to prefer them over apparently credible accusations."

The outtakes of Wallace's long interview with Westmoreland are littered with the general's denials. Westmoreland said ten separate times, for instance, that his command's estimates of enemy strength were validated after the Tet offensive. None of it was used.

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Westmoreland in the documentary.

Will the jurors consider the omission to be reckless disregard or will they remember that other Westmoreland denials and explanations were included in the documentary?

Also left out of the program was a remark in which the general questioned Wallace's competence to criticize his conduct: "See, I happened to be in Vietnam. I don't know where in the heck you were, but I was in Vietnam." That was certainly no evidence of malice, but it might be interpreted as CBS' not allowing the general to give his full version of the truth.

Burt prepared the jury for the outtakes by portraying Westmoreland as "an old man" who was "rattlesnaked" by Wallace's grilling on 14-year-old events. "Watch the man trapped in that interview," Burt said.

Boies responded by telling the jury: "Listen to General Westmoreland's answers and compare them to what he said here today [in testimony]. Ask yourself which explanation is likely to be most accurate."

Crile's interview with Commander James Meacham, one of Westmoreland's intelligence officers, might also have been perceived by the jury as damaging. Pressed again and again by Crile, Meacham finally exploded: "I mean you're trying to get me to say that we all

falsified intelligence. I'm not gonna say it 'cause I don't have any sense of having done that." He added later: "I don't know what you're trying to get me to say." Meacham also disagreed with the program's thesis: "It's not a question of honesty or dishonesty, and I think it's wrong of you to try to use those words."

None of that was used: out of an interview of more than an hour, Meacham uttered just ten sentences on the broadcast. They included statements supporting another aspect of the show's premise—that one of Westmoreland's commanders ordered incriminating computer records erased. But the omission of statements by Meacham that were friendly to the thesis of the documentary could convince the jury that CBS showed no reckless disregard. The network did not use some evidence from Meacham that did support the program's main premise. It included letters written to Meacham's wife in which he strongly suggested that Westmoreland's command was falsifying intelligence reports.

He wrote: "Someday, it may come out about how we lied about these figures." And: "I've never in my life assembled such a pack of truly gargantuan falsehoods." And: "We spare no current effort to make these fictions seem true."

What, then, is the jury to believe about CBS' state of mind based on hours of raw film that, by virtue of the imprecise art of interviewing and the human tendency to contradict one's own words, lead each viewer to a different conclusion?

Westmoreland's lawyers hope the network's editing distortions, its failure to interview those who disagreed with its premise and its failure to broadcast contradictory statements from those it did interview will help convince the jury that Crile and others at CBS exhibited reckless disregard for the truth.

The network's lawyers hope that the outtakes are so long and so full of subjective, contradictory statements that a jury will either disregard them or conclude that Crile did the best he could with the whole mess. They hope, too, that the jurors will ask themselves how they might have boiled down such a mass of raw footage.

The outtakes are only a part of the mountain of evidence and testimony in a trial that is likely to last four months or longer. But they make for compelling viewing, and both sides will bear that in mind when the outtake witnesses testify in person.

CBS, as a defendant whose collective state of mind is at issue, must be particularly concerned with videotaped images left in the minds of jurors. The power of the network's own medium could be turned against it.

"For better or worse," says Kaufman, the New York libel lawyer, "CBS is stuck with having to defend something the never put on the air."